SUPREME COURT, U. S.

FILED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 974

[redacted]

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [redacted] CIRCUIT

[redacted]

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. .....

ELDON WAYNE McKUIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Eldon Wayne McKuin, Petitioner, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this cause on October 16, 1970.

OPINION BELOW

The opinion of the court of appeals is not yet reported and is printed as Appendix, *infra*.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*) was entered on October 16, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was a prejudicial misjoinder of offenses and defendants under Rule 8, F. R. Crim. P., where each count of a sixteen counts indictment charged the same scheme but the evidence showed a multiplicity of schemes.

2. Whether petitioner was so prejudiced by such joinder of offenses and defendants in a trial together that the trial court abused its discretion under Rule 14, F. R. Crim. P., in denying petitioner a severance or other relief required by justice.

3. Whether Petitioner was deprived of rights of confrontation under the 6th Amendment by the granting of testimonial privilege against self incrimination to an identifying witness, who identified this Petitioner on direct examination, even though the jury was later admonished to disregard same, upon motion of co-defendant.

4. Prosecutorial misconduct could not be effectively dispelled by a court's striking of testimony of identification witness, and later instruction for jury to disregard, when said witness was again presented before the jury three days later.

5. Jury instructions to disregard evidence not relevant to the named defendants, in a case joining three (3) defendants and six (6) co-conspirators, were ineffectual to dispell poisonous testimony of illegalities of the six non-defendants, when the majority of the testimony adduced, and majority of the Counts (Counts 4, 5, 6, 7, 8, 9, 10,

11, 13, 14 and 16), pertained to activities of the six non-defendants, the plethora of evidence not germane to Petitioner constituted a deprivation of due process under the 5th Amendment, and induced a finding of "guilt by association" by the jury.

STATUTES AND RULES INVOLVED

18 U. S. C. 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose, or loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheem or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Rule 8 of the Rules of Criminal Procedure provides:

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on

the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

STATEMENT

Constitution, United States, Amendment V.

Constitution, United States, Amendment VI.

Each count of the sixteen-count indictment charged one single, identical scheme to defraud, with separate mailings. The petitioner, Walter Jerrold Frey, and Mrs. McKuin were named as defendants in each count of the indictment. Still different and separate activities were shown by the evidence, and indeed by the indictment itself.

Prior to trial petitioner moved for a severance, on the ground among others, that "there is a misjoinder of defendants and offenses in the indictment." Also he moved to dismiss the indictment alleging, among other grounds, that "the indictment, and each count thereof, charges a multiplicity of alleged schemes, does not charge one single scheme to defraud, and consequently is duplicitous." These motions were overruled.

After trial petitioner's motion for a new trial, which was also overruled, contained the same grounds in more detail.

The evidence adduced may be summarized briefly as follows:

Co-defendant Frey operated the Jerry Frey Marine Sales Co. at Alton, Illinois, and Petitioner operated a telephone answering service company at 225 South Meramec, Clayton, Missouri. Frey's company was placed into receivership in October 1966 (Tr. 368).

The earliest incident, related in the evidence concerned a loan, purportedly secured by a boat, in the name of William A. Hoover. This loan and a subsequent claim made on insurance on the purported boat were the mailings alleged in Counts Two and Twelve of the indictment.

On March 1, 1966, Mr. William A. Hoover purchased a boat from the Jerry Frey Marine Sales Co. Frey was financing boats held in stock through the First National Bank of Alton, Illinois. At the same time that Hoover purchased his boat, Frey caused a second loan to be made with the First National Bank of Alton, in Hoover's name. This loan was identical to the real Hoover loan except that another serial number was used for the boat. Frey made the payments on the loan, totaling seven payments, until he went out of business on October 31, 1966 (Tr. 253-263, 364-369).

On July 6, 1966, insurance was taken out on this claimed boat, using Frey's home address. On September 27, 1966, someone claiming to be Hoover called the State Farm Insurance Agency and reported that the boat had been sunk, making an oral claim for insurance. In January 1967, the State Farm Insurance Company rejected the claim which was not pursued and refunded the premium on the insurance. The refund check in the amount $81.34 was sent to Hoover at Frey's home address (Tr. 178-186). The registration card accepting this check was signed "Jerry Frey," but the postal authorities could not

identify Frey as the person who signed the registration receipt (Tr. 352-357). The check was negotiated in the name of William A. Hoover. The Court acquitted the petitioner on these counts.

The second incident, being the mailing in Count 1, involved a loan on a boat in the name of Frederick Clemens in April 1966. One Charles Ross sold a boat to Frederick Clemens with the Jerry Frey Marine Sales Company acting as broker. Frey called credit information to the lending institution to obtain a loan in the amount of $4,000.00 for Frederick Clemens to finance the purchase, with his employment being one of the companies whose telephone was answered at the McKuin Answering Service. Government witness, Walter Younge, testified that he brought one Fred Clemens in for this sale (Tr. 166-7). Younge received two-thirds of a $1,000.00 commission for doing so, with petitioner retaining $350.00 (Tr. 615-618, 166-167). Mr. Fred Clemens, although admittedly a friend and close resident of Walter Younge, testified that he did not purchase the boat (Tr. 266-273). Frey was also instrumental in supplying a survey report on the boat to the lending institution. The serial number on the boat shown in the survey report was not one used by the manufacturing company, and Mr. Sherlock, Frey's employee, whose name was signed to the report, denied signing it (Tr. 221-232). The check issued by the lending institution to Fred Clemens was negotiated at Frey's place of business, the records showing that $3,000.00 went to Charles Ross, $650.00 to Walter Younge and $350.00 to the company (Tr. 205-233, 615-618).

The majority of the evidence adduced related to credit cards, and purchases made thereby, which were issued in the name of Kenneth Pohlmann (The Mailings in Counts 4, 6, 8, 9, 13, 14 and 16) and in the name of Jess C. Cummings (Counts 5, 7, 10 and 11).

The evidence disclosed that in May 1965, one Kenneth Pohlmann bought a boat from the Jerry Frey Marine Sales Company. In January 1966, Mr. Pohlmann moved to Ohio (Tr. 69-101). In late June 1966, one Sarah Jean Daniels, a 17 year-old girl, met one James Rosenthal. Immediately thereafter she moved into an apartment at 4255a Geraldine occupied by James Rosenthal and James Robinson. She lived at this apartment until about August 11, 1966, when she moved to another apartment occupied by the same people approximately two blocks away at 10087 Executive Drive, where she lived for about a week. She testified that she overheard conversations among Robinson, Rosenthal, Defendant Frey and Defendant McKuin concerning credit cards and concerning Kenneth Pohlmann, Jess C. Cummings and Salvatore Levintino.

The Daniels girl also testified that on August 1, 1966, she went with Defendant Frey to rent an apartment at 965 Daulphin Street in the name of Kenneth Pohlmann and his wife, and that petitioner signed the name Kenneth Pohlmann to the lease and she signed the name of Mrs. Pohlmann (Tr. 24-68).

On June 30, 1966, a false application was made for a Mobil Oil Credit Card and on the same day a false application was made for a Central Hardware Credit Card both in the name of Kenneth Pohlmann, the address of Petitioner at 12318 Gravois Avenue was used on these applications. Employment and credit references were furnished as companies and telephone numbers answered at the McKuin Answering Service (Tr. 233-252). On July 25, 1966, a similar application was made for a Shell Credit Card; on July 28, 1966, a similar application was made for a Carte Blanche Credit Card; and on September 9, 1966, a similar application was made for a Famous-Barr Credit Card all in the name of Kenneth Pohlmann and using the 965 Daulphin Street address.

The handwriting expert testified (based solely upon a comparison of the name "Kenneth Pohlmann" signed to the lease to the 965 Daulphin Street apartment, and upon printing) that all these applications were in the printing and signed in the handwriting of the Defendant Frey (Tr. 496-516, 538-579). Although extensive purchases were made on these credit cards (Tr. 274, 283, 316, 371, 372, 418, 420; Exhs. 75-86, 53-62, 33-47), the handwriting expert (again based solely on printing and the above-mentioned written name) testified that Frey made only three purchases of oil on the Mobil Oil card, two purchases at Central Hardware and one purchase at Famous-Barr. In other words, these were the only purchases which the handwriting expert stated were made by Frey on any of the credit cards issued in the names of Kenneth Pohlmann or Jess C. Cummings (Tr. 577-579).

On September 18, 1966, the Petitioner and his wife purchased a boat at the Lake of the Ozarks in the name and credit of Kenneth Pohlmann. This transaction, about which there was much testimony, was the subject matter of Count 15. This Count 15 was dismissed by the Government, just prior to the case going to the jury, with respect to Defendant Frey (Tr. 90-95, 101-121, 392-3, 398-403, 421-425). The evidence also showed that Petitioner in a similar manner purchased and financed a car (Tr. 375-408).

On September 21, 1966, a change of address card was filed with the Post Office system changing Mr. Kenneth Pohlmann's address from 965 Daulphin Street to 12318 Gravois Avenue, which was the address of the Petitioner. On October 9, 1966, a change of address card was filed with the Post Office system changing the address of Kenneth Pohlmann from 12318 Gravois to 225 Meramec Street, which was the address of a telephone answering system operated by the Petitioner. The handwriting expert found these to be in the handwriting of the Petitioner.

Petitioner was found guilty of thirteen counts, most relating to these credit cards, and of the two counts concerning the changes of address.

In the applications for these credit cards, Mr. Kenneth Pohlmann's place of employment and certain credit references were given as companies whose telephones were answered by Petitioner's answering service which was located at 225 Meramec in Clayton, Missouri.

The only evidence which associated petitioner with these credit cards was the use of Petitioner's address, the use of credit references of companies serviced by his answering service, and testimony of a general meeting of parties by witness Sarah Jean Daniels.

On November 9, 1963, the Jerry Frey Marine Sales Company sold a boat to Jess C. Cummings. Mr. Cummings lived at the Lake of the Ozarks in central Missouri (Tr. 122-145). On July 28, 1966, a false application was made for a Mobil Oil Credit Card in the name of Jess C. Cummings giving his address as 10087 Executive Drive, one of the apartments where Robinson and Rosenthal lived, with employment and credit references of companies answered at the McKuin Answering Service (Tr. 233-252). On August 3, 1966, similar applications were made for a Sears Credit Card and a Central Hardware Credit Card in the name of Jess C. Cummings which applications were mailed from Alton, Illinois. On August 10, 1966, a similar application was made for a Scruggs Credit Card in the name of Jess C. Cummings giving the address as 10087 Executive Drive. Again employment and credit references were supplied which were numbers answered at the McKuin Answering Service.

The handwriting expert testified that these applications were in the handwriting of Defendant Frey but he based his conclusion solely on printing and upon the letter "J"

which was contained both in the name Jess C. Cummings and in the signature of Defendant Frey.

During the period from August 14, 1966 to August 28, 1966, Defendant Frey was in the hospital as a result of a boating accident (Tr. 342, 620-621, 634-639) and was incapacitated for a month or so and at the time the purchases attributed to him by the handwriting expert were made.

Of the four counts relating to credit cards in the name of Jess C. Cummings, the Defendant Frey was convicted on two counts, being counts five and seven, for Mobil Oil Credit Card and Scruggs Credit Card, and acquitted on two counts, being Counts 10 and 11, for credit cards at Central Hardware and at Sears. Petitioner was convicted of all.

The last incident that was referred to in the evidence, being Count 3, concerned a false loan purportedly obtained by Salvatore Levintino on August 10, 1966, for $4,359.60. At that time Salvatore Levintino purportedly purchased a boat from one Robert J. Cummings. A loan was obtained from the lending institution in Mr. Levintino's name. The note and mortgage for this loan gave Salvatore Levintino's address as 10087 Executive Drive (Tr. 145-158, 188-205). Government witness Walter Younge testified that Defendant Frey signed Salvatore Levintino's name to the note and mortgage and that he signed the name of Mrs. Levintino (Tr. 159-163). A check in the amount of $3,600.00 was issued in the name of Salvatore Levintino, which was negotiated at the Jerry Frey Marine Sales Company in exchange for a boat purported sold to one Robert J. Cummings. An employee at the Jerry Frey Marine Sales Company testified that he handled this sale but no Robert J. Cummings was ever located (Tr. 358-359, 612-615). Two payments were made on this loan by money orders in the name of Salvatore Levinto. Mr. Vollertsen testified that the same person who wrote "Sal-

vatore Levintino" on the note and mortgage also wrote that name on the money orders. A person by the name of Robert J. Cummings could not be located at or near the address given for him (Tr. 358-359). Mr. Salvatore Levintino testified that he did not make this loan and that he did not sign the note and mortgage. He also testified that immediately prior to August 1, 1966, he had occupied the apartment at 965 Daulphin which had been rented and used as an address for Kenneth Pohlmann (Tr. 145-158). Sarah Jean Daniels testified that mail and phone calls were received at 4255a Geraldine for and in the name of Kenneth Pohlmann and that mail and phone calls were received at 10087 Executive Drive for and in the name of Jess C. Cummings and Salvatore Levintino (Tr. 30). Petitioner was convicted on this count, also.

REASONS FOR GRANTING THE WRIT

1. Important questions of general applicability affecting the administration of criminal justice in the Federal Courts, and the application of Rules 8 and 14 of the Federal Rules of Criminal Procedure, are here presented. Separate and distinct conspiracies, even though they have a common link and like object, cannot be joined together and prosecuted as a single conspiracy. **Kotteakos v. United States**, 328 U. S. 750; **Canella v. United States**, 157 F. 2d 470 (C. A. 9); **United States v. Goss**, 329 F. 2d 180 (C. A. 4); **Rocha v. United States**, 288 F. 2d 545 (C. A. 9); **United States v. Russano**, 257 F. 2d 712 (C. A. 2); **Dailey v. United States**, 282 F. 2d 818 (C. A. 9).

The scheme was charged in the first Count of the indictment and incorporated in the other Counts. It is apparent from a reading of the indictment and the transcript that the Government grouped together a number of independent transactions, and merely designated them as one single scheme. The courts have consistently ruled

that prosecution of a number of separate ventures as one scheme in one Count of an indictment is not permissible. **Kotteakos v. U. S.**, 328 U. S. 750; **United States v. Wertman**, 7 Cir., 326 F. 2d 717; **United States v. Russano**, 2 Cir., 257 F. 2d 712; **Rocha v. United States**, 9 Cir., 288 F. 2d 545; **Canella v. United States**, 9 Cir., 157 F. 2d 470; **Daily v. United States**, 9 Cir., 282 F. 2d 818.

A single scheme or conspiracy may exist even though not all the conspirators participated in all parts of the conspiracy, particularly when it extends over a long period of time. **Blumenthal v. United States**, 332 U. S. 539. This type of conspiracy has been referred to as a chain conspiracy. **United States v. Borelli**, 336 F. 2d 376, 383 (C. A. 2) certiorari denied 379 U. S. 960. But the fact that some objects of distinct activities are similar, or even identical, is not enough to make such activities all a part of one single scheme. Each such activity must be a part of one "single, over-all, comprehensive plan", design or agreement. **Blumenthal v. United States**, supra, at 558. The three activities shown by the evidence here were not links of one chain or conspiratorial plan, but separate and distingt plans or schemes. First, there were the loans on boats, apparently to bolster Defendant Frey's failing business, with which Petitioner had no concern. Second, there was the credit card scheme. And, third, there were the purchases by Petitioner of a boat, of which Defendant Frey had no concern. The Government's own evidence affirmatively established that there was no overriding conscious design or plan which tied the three ventures together into one scheme.

For a long time, since **Blumenthal** was decided in 1947, the Federal Courts have been struggling to solve the problems of mass trials, and consequently joinder, by undertaking to fit each case into "wheel" or "chain" activities as illustrated by **Kotteakos and Blumenthal**, respectively.

It has been said that such distinction "is not a substitute for close thinking in particular cases". **Wright, I Federal Practice and Procedure**, 332. Nevertheless, the activities proved were separate and distinct and the prejudice to petitioner of the joint trial is clear.

Because the prejudice to petitioner of the joint trial is so clear in the instant case (cf. **Berger v. United States**, 295 U. S. 78), and the activities so distinct and dissimilar, this case is, we submit, an excellent vehicle for this Court to clarify the law on this important subject in the administration of criminal justice.

2. It has been said that "trials involving large numbers of separate offenses are not the favorites of the law". **Daly v. United States**, 342 F. 2d 932, 933 (C. A. D. C.), certiorari denied 382 U. S. 853. Though many of the States have practiced this principle, requiring a separate trial for each offense and each defendant (See R. S. Mo. 1959, Section 545.880), we strongly urge that this principle has not been practiced much in the Federal Courts. But we submit that this distinction in Federal and State law causes an accused to receive a fairer trial in the State Courts than in Federal Courts. This Court, while more recently engaged in correcting other State and Federal abuses in criminal justice, has not been wholly indifferent to this injustice in Federal Criminal Procedure. During the redrafting of the Federal Rules of Criminal Procedure, this Court asked the Advisory Committee whether any study of the abuse of indictments drawn with an excessive number of counts had been made. Orfield, **Relief From Prejudicial Joinder in Federal Criminal Cases**, 36 Notre Dame Law 276, 766.

The new Rule 14, Federal Rules of Criminal Procedure, which became effective July 1, 1966, liberalized the rule on severance. It provides, for the first time for the Court to make *in-camera* inspection of statements and confes-

sions of defendants to aid in ruling on a motion for severance. The note to the rule states that "recent Fifth Circuit cases have found sufficient prejudice involved to make denial of a motion for severance reversible error. See **Schaffer v. United States**, 221 F. 2d 17 (5th Cir., 1955); **Barton v. United States**, 263 F. 2d 894 (5th Cir. 1959)." So this Court has found that a confession of a co-defendant was prejudicial, and its use required severance. **Bruton v. United States**, 88 S. Ct. 1620. More frequently now, the Courts are ruling that the failure to grant a severance is an abuse of the trial Court's discretion. **United States v. Kelly**, 2 Cir., 349 F. 2d 720, 758; **DeLuna v. United States**, 5 Cir., 308 F. 2d 140; **United States v. Echeles**, 7 Cir., 352 F. 2d 892. See **United States v. Talenfeld**, 190 F. Supp. 108, 110; **Haggard v. United States**, 369 F. 2d 968, 973-4 (C. A. 8).

Certainly this is an appropriate case for this Court to delineate the duties of a trial Court pursuant to Rule 14. For this Court has said that the trial Court should become "particularly sensitive" to prejudicial joinder. **Shaeffer v. United States**, 362 U. S. 511, 516.

3. The assertion of testimonial privilege in cross-examination was last examined by this Court in 1963, in **Namet v. U. S.**, 373 U. S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278. With two judges dissenting, this Court determined same on the basis of (1) prosecutorial misconduct and (2) the addition of critical weight to the prosecution case. This Court has not ruled on the 6th Amendment right of a defendant to fully cross-examine when a witness has waived his rights against self-incrimination, on direct testimony, and the Trial Court fails to compel answers to full interrogation. This decision, by the 8th Circuit, failed to expressly rule upon deprivation of Defendant McKnin's 6th Amendment rights to full confrontation, although discussing the two criteria set forth in **Namet v.**

U. S., supra, failed to rule upon testimonial waiver of witnesses' privilege against self incrimination and appears to be in conflict with the principles enunciated by the 5th Circuit, 1967, in **Fountain v. U. S.**, 384 F. 2d 624, cert. denied 390 U. S. 1005, 88 S. Ct. 1246, 20 L. Ed. 2d 105.

In **Namet v. U. S.**, 1963, 373 U. S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278, Justice Black and Justice Douglas dissented. Said decision was based upon the question of prosecutorial misconduct and this Court then found no planned or deliberate attempts by the Government to make unfair capital out of the witness' refusal to testify, especially when defense counsel had failed to object and acquiesced in the Court's procedure. Said decision was not based upon the defendant's Sixth Amendment rights of confrontation and cross-examination of the witness. This Court further found, 373 U. S. 189, that the testimonial privilege was only allowed in regard to a matter about which abundant other evidence was given, and that any inferences gained by the testimonial privilege would only provide cumulative support for an inference well established by the non-privileged portion of the witness' testimony.

The case at bar appears to be in conflict with the 1967 decision of **Fountain v. U. S.**, 384 F. 2d 624, cert. denied 390 U. S. 1005, 88 S. Ct. 1246, 20 L. Ed. 2d 105. Said decision more fully discussed the Fifth Amendment privilege of the witness, the waiver thereof, and the balance of same with the Sixth Amendment rights of the defendant to confrontation. In **Fountain** relief was denied to defendant upon a witness' assertion of testimonial privilege in cross-examination where there was no request to and no ruling by the Trial Judge, and the defendant had not advised the Court of the purpose of his inquiry. The ultimate inquiry is always whether the defendant has been deprived of his right to test the truth of the direct testimony. If testified on direct, testimonial privilege is not available

for the witness to conceal details, or fail to explain the direct testimony, on cross-examination. Only after sufficient latitude of cross-examination has been allowed by the Court to satisfy the Sixth Amendment requirement, may the Trial Judge limit cross-examination, in the interest of fair play. **Fountain v. U. S.**, 384 F. 2d 624, 628, C. A. 5, 1967; **United States v. Cardillo**, 316 F. 2d 606, 611, C. A. 2, cert. denied 375 U. S. 822, 84 S. Ct. 60, 11 L. Ed. 2d 55 (1963); **Rogers v. U. S.**, 340 U. S. 367, 71 S. Ct. 438, 95 L. Ed. 344 (1951); **Montgomery v. U. S.**, 203 F. 2d 887, C. A. 5 (1953).

In the cause herein, the witness Bishop testified (Tr. 377, 378) on direct examination that petitioner was the man who actually appeared before the witness and represented himself as a Mr. Jess Cummings in the purchase of an automobile. The name Jess Cummings was utilized, and was the basis of four (4) counts, for the use of fraudulent information in the procurement and purchases by credit cards. This was the main testimony which identified the petitioner as Jess Cummings. When the witness was further asked on direct examination as to whether he took the credit information (Tr. 382), his claim of testimonial privilege was sustained. On cross-examination (Tr. 389, 390), the witness Bishop was asked if he knew that a fictitious name was being used at the time this auto was being purchased and he refused to answer upon the basis of testimonial privilege. Thereafter, petitioner's counsel asked for a mistrial (Tr. 394). Upon the claim of the prosecutor that he had no advance knowledge of the witness' intention to assert his Fifth Amendment privilege, same was denied. Counsel for the other defendant who waived cross-examination, then asked (Tr. 396) that the jury be instructed to disregard the testimony, which was given by the Court. Petitioner's counsel did not ask for such admonition, but only asked for mistrial.

Counts 5, 7, 10 and 11 of the indictment, upon which petitioner was convicted, pertained to the use of credit cards, and purchases made thereby, issued in the name of Jess C. Cummings; the main evidence that petitioner posed or represented himself as Jess C. Cummings, was this testimony of William Bishop. The poisonous effect of such testimony penetrated to the jury, although the Court admonished the jury to disregard same. The 8th Circuit held the error was cured by such admonition, but failed to take cognizance that three days later, on the following Monday, said witness William Bishop was again recalled in the jury's presence. The witness again asserted his privilege against self-incrimination, this time outside the jury's presence (Tr. 404-409). This further reminder of this extremely damaging testimony was not mentioned by the Court of Appeals in its finding of no prosecutorial misconduct.

This factual situation differs markedly from **U. S. v. Hoffman**, C. A. Wisc., 1967, 385 F. 2d 501, cert. denied 390 U. S. 1031, 88 S. Ct. 1424, 20 L. Ed. 2d 288, where the witness merely gave his name and address and then asserted privilege, the prosecutor asked very few questions about where the witness was living as of a date of the arrest, and the Court properly found no prosecutorial misconduct from that simple and timely assertion of privilege. In **U. S. v. Edwards**, 366 F. 2d 853, C. A. 2, 1966, the Court only determined that the fairness of the trial was not vitiated when the Government called a witness to the stand which it in good faith believed had waived the privilege. The Court found, p. 870 ". . . no conscious and flagrant attempt to build its case out of inferences arising from use of testimonial privilege." Contrary to this, see **U. S. v. Maloney**, 262 F. 2d 535, C. A. 2, 1959, where the Government made reference to and relied on inferences from a witness' failure to testify. Assertion of Fifth Amendment privilege by a witness has been held to be

prejudicial. **Sanders v. United States**, 373 F. 2d 735, C. A. 9, 1967; **Fletcher v. United States**, 332 F. 2d 724, D. C. Cir. 1964. But see **Baker v. United States**, 389 F. 2d 629, C. A. 7, 1968.

In the case at bar, the Court of Appeals' opinion did not mention the fact that the witness Bishop waived his right against self incrimination on direct testimony, when identifying the petitioner as Jess C. Cummings. This vital fact, extremely damaging, was a matter about which this defendant had a Sixth Amendment right to extensively cross-examine. The admonition of the Court to disregard all said testimony, given of the behest of counsel for a co-defendant (who had waived cross-examination), could not have destroyed the permeating effect of same, and prosecutorial misconduct was evidenced by again parading said witness to the stand in open Court, even though no further interrogation took place in the jury's presence on said subsequent date.

That the right of cross-examination is the purpose of, and is included in the right of an accused in a criminal case to confront witnesses against him, see **Burton v. U. S.**, Mo., 1968, 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476; **Barber v. Page**, C. A. Okla., 1966, 381 F. 2d 479, reversed on other grounds 390 U. S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255; **Grant v. U. S.**, 368 F. 2d 658 (C. A. 5, 1966); **Dixon v. U. S.**, 333 F. 2d 348 (C. A. 5, 1964); **U. S. v. Norman**, 402 F. 2d 73, C. A. Cal., 1968.

4. The poisonous effect of identification by a witness, William Bishop, of Petitioner, in direct testimony, as a person representing himself as another who has fraudulently obtained and purchased articles on a spurious credit card issued to a "Jess C. Cummings", which said purchases were the subject of 4 Counts, and which testimony was the main basis for inferences that said Defendant

had made purchases with said credit card, remains when the Court allows witness Bishop's assertion of privilege against self incrimination, as to said identification, in cross-examination. An admonition to jury to disregard same, requested by counsel for co-defendant who did not cross-examine, could not dispel the permeation of said identification of Defendant McKuin, and denial of said Defendant's request for mistrial was prejudicial error, especially when said witness was recalled in front of the jury 3 days later, although not interrogated in their presence. Nor could the jural impression gained therefrom be effectively dispelled by the Court's instructions at a later time.

The only reason for the re-presentment of the witness Bishop before the jury (Tr. 404-409), after he had asserted testimonial privilege, and the jury admonished thereon, would be the unfair advantage gained by the Government in further reiterating, and emphasizing, the forbidden testimony. This case is a proper vehicle for delineating prosecutorial abuses.

5. The problems and inequities arising from joinder of numerous counts and numerous persons, most of whom are not defendants, is set forth in points 1 and 2 herein. The Court's instructions to disregard incompetent and non-relevant evidence, some extremely damaging, can never be effectively dispelled when the Government is allowed to parade criminal activities of six other persons before the jury trying three. The criteria of fair trial is vitiated when a majority of the evidence, and counts, pertain to others than Petitioner, or his co-defendants. This case presents an excellent vehicle for determination of joinder of counts and defendants, and the limited effect the Court's continuing instructions can possibly have.

CONCLUSION

For the reasons stated herein, we respectfully submit that the Petition should be granted.

Respectfully submitted

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